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No.

In The

Supreme Court of the United States

October Term, 1992

MITCHELL LIPSHUTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a prosecution every violation of the "under color of official right" Hobbs Act offense which involves a non-campaign contribution the United States is required to prove *quid pro quo* beyond a reasonable doubt? Specifically, this case presents this Court with the issue left unresolved in *McCormick v. United States*, ____ U.S. ____, 111 S.Ct. 1867 (1991), as to whether every violation of the Hobbs Act by an elected official requires proof of a *quid pro quo*?

2. Whether the interstate commerce element of the Hobbs Act requires that the specific source of the funds be identified as being within interstate commerce? Specifically, whether in this case the United States was required to prove beyond a reasonable doubt that the monies were union funds?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MITCHEL LIPSHUTZ, PETITIONER

- vs.-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgments of the Third Circuit entered in this proceeding on July 13, 1992.

OPINION BELOW

The Judgment Order of the Third Circuit Court of Appeals is appended to this petition.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the Third Circuit Court of Appeals is based on 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under 18 U.S.C.A. §1951.

Statement Of The Case

I.

Introduction

a. The Question At Issue

The instant matter presents this Court with an appropriate and compelling opportunity to resolve the issue left unanswered in **United States v. McCormick**, ___ U.S. __,111 S.Ct 1867 (1991), as to whether every violation of the Hobbs Act by an elected official requires proof of a **quid pro quo**. In **McCormick**, this Court ruled that acceptance of a campaign contribution is wholly outside the purview of the Hobbs Act unless it is proven to entail a **quid pro quo**. The **McCormick** Court specifically declined to decide the question at issue as to the applicability of the Hobbs Act to non-campaign contributions. The Court so limited its ruling because the

singular contention of the petitioner before it was that payments made to him were campaign contributions.

The decision of the **McCormick** Court not to resolve the issue as to receipt of non-campaign contributions has generated much attention and engendered confusion as to the definition of the "under color of official right" element of the Hobbs Act. So too, as will be discussed **infra**, this Court's recent decision in **Evans v. United States**, ___U.S.__, **119 L.Ed.2d 57 (1992)**, has ignited substantial controversey because a concurring justice and three dissenting justices therein interpret the majority opinion as extending the **quid pro quo** requirement set forth in **McCormick** to non-campaign contributions. In this context, it should be emphasized that the issue in **Evans** was not whether the statute requires a **quid pro quo**. Rather, **Evans** related to a claim by the petitioner therein that inducement by the public official is an element of the "under color of official right" offense. Inducement and **quid pro quo** are distinct concepts.[1]

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1. Inducement relates to an affirmative approach by the public official. **Quid pro quo** relates to the necessity that the public official accede to a receipt of funds which he knows to be offered in return for an official act. Inducement goes beyond **quid pro quo** in requiring that the public official initiate the exchange of a thing of value.

Although the **Evans** majority expressed a resolve to decide only the question as to whether inducement is an element of "under color of official right," its holding necessarily impacted upon the **quid pro quo** issue. Such an analysis was necessary because the **Evans** majority was constrained to describe each of the elements of "under color of offical right" in order to reach its conclusion that inducement is not included therein. The holding in **Evans** in our view clearly set forth **quid pro quo** as an element of any Hobbs Act "under color of official right" violation. We stress that at least four justices of this Court have expressly interpreted **Evans** in this fashion.

b. The Analysis Of The District Court

Petitioner herein was an elected municipal court judge in the city of Philadelphia. He was indicted under the Hobbs Act for acceptance of money from a representative of Roofer's Union Local 30/30B. That union routinely offered Christmas presents to local judges, court officials and some district attorneys. Petitioner admitted acceptance of $500.00 from Stephen Traitz, who was the business manager of the local. Traitz was also a long-time friend of petitioner, who had

supported him (petitioner) in various political campaigns, both with physical effort and fund-raising. With regard to the $500.00 which underpinned the indictment, petitioner testified that he believed it was offered as a wedding gift. He accepted it on that basis.

At trial, petitioner argued that the Hobbs Act "under color of official right" offense required proof of a **quid pro quo**. Accordingly, it was urged by petitioner that the legal instructions to the jury must incorporate the element of **quid pro quo**. Petitioner cited **McCormick** for this proposition. The district court distinguished **McCormick** on the ground that a legislator or other office holder is different from an elected jurist. The district court also stated that **McCormick** was limited to campaign funds and opined that the result would have been diffeerent if the petitioner therein was an elected judge. The district court stated:

> In that **McCormick** case, you have other matters in there. That's a person who is holding state office [who] has to respond in some way or other to constituents' demands... what is a judge allowed to do for a constituent? Nothing... I think if he were a judge they wouldn't have made that decision... I am going to instruct the jury in this case that its enough that Steven Traitz have transferred something of significant value to the

> defendant with the expectation that the defendant, a public official, will extend to him some benefit or refrain from some harmful action, and the public official accepts the thing of significant value knowing that it is being transferred to him because of his office. [Transcript of July 17, 1991 at pages 172-176].

It is absolutely clear that this matter squarely raises the issue left unresolved in **McCormick**. The district court denied an instruction as to **quid pro quo** because it interpreted **McCormick** as being limited to campaign contributions and to elected officials who are seated in non-judicial offices. This Court should grant **certorari** to resolve the issue in question. Resolution of this issue is not only of great juridical significance - it may restore the dignity of a presently impeached and disgraced jurist whose life has been placed in disarray by acceptance of what he believed to be unencumbered wedding gift.

II.

The United States' Proofs

A. The Aborted State Court Prosecution

AUSA Peter F. Schenck prosecuted the entirety of the instant matter in the Eastern District of Pennsylvania. Schenck both conducted grand jury proceedings acted as trial prosecutor.

Moreover, Schenck's association with development of a prosecution of petitioner commenced prior to his role as federal prosecutor herein. Prior to his present employment by the United States Attorney, Schenck was in private practice and thereafter worked within the Office of the Attorney General of Pennsylvania. Schenck also worked for the United States Attorney prior to entering private practice. Schenck departed from private practice and assumed the state prosecutor position specifically "to handle matters involving the Judicial Inquiry Review Board... and the proceeding with investigations of any judges for state violations and other matters." This matter arose from an inquiry before that Board which stemmed from a federal investigation of the Roofer's Union.

So too, in his state prosecutor capacity, Schenck supervised an investigation of petitioner for the very matters which underpinnned this federal prosecution. That investigation resulted in the filing of a state criminal complaint against petitioner. Prior to the filing of the complaint, state authorities communicated with agents of the federal government, including the United States Attorney's office with whom Schenck later became re-employed. The respective law enforcement agencies

agreed "that [the instant matter] would be a state prosecution rather than a federal prosecution."

Subsequent to the filing of the state court complaint, a preliminary hearing was conducted. Thereafter, "the [state] case was not put forward or pushed forward or moved forward." Schenck stated that "it was [his] fault that it didn't go forward and it was basically due to negligence on [his] part." The Commonwealth's failure to timely pursue the matter resulted in a bar to prosecution based upon state laws relating to a speedy trial. The bar to a state prosecution became applicable in mid-1988.

In December of 1989, after the state court prosecution became barred, Schenck accepted employment with the United States Attorney. In January of 1990, discussions commenced in that office relative to a federal prosecution of petitioner. Schenck pressed for transformation of this matter from a state court bribery charge into a federal Hobbs Act violation as a means of resuscitating it. Schenck testified:

> I told [my supervisor] that the [state prosecution] had been lost... I told him that it was largely my fault. And that I believed that there was... a potential Hobbs Act case there.

Schenck thereafter "sat down with agents [and] reviewed the files that were [available], to see what, if anything, was there in addition to what had been furnished to him in the State." This federal prosecution arose from his review of those materials and presentation of this matter to a federal grand jury.[2]

B. The Alleged Hobbs Act Violation

i.

Electronic Surveillance Of The Roofer's Union

In September of 1985, federal authorities "made application to the United States District Court for authority to intercept communications within the [Roofer's] union hall." The authorities obtained permission "to install listening devices in the office of Steven Traitz Jr., who was the business manager of the union, that being the lead official of the union [and] also an adjoining room that was named the business agent's meeting room."

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2 The conduct of this matter demonstrates the inherent unfairness in extension of the Hobbs Act to conduct clearly governed by state bribery laws. The state bribery prosecution was not pursued diligently. Over-broad extension of the Hobbs Act permitted the same prosecutor to prosecute petitioner in both state and federal court for the same conduct.

a. The Pertinent Recordings Played At Trial

Several of the conversations recorded within the union premises were adduced at trial as evidence over petitioner's objections. The recordings were played notwithstanding the fact that petitioner's voice was not intercepted during any conversation.

1. October 8, 1985

Steven Traitz Jr. (hereinafter "Traitz") and Michael "Nails" Mangini were intercepted on October 8, 1985. The single reference to petitioner was with reference to the fact that he was "cross-endorsed" in his campaign for a position as a Common Pleas Court judge.

2. October 22, 1985

Traitz and Tommy Brown were intercepted on October 22, 1985. Grace identified Brown as "a casual employee of the union [whose] function was to run errands and he is a retired employee of the Philadelphia court system." Traitz and Brown essentially discussed "who we give [money to at Christmas] and what we give to them." Brown's role was to generate a list.

3. October 29, 1985

Traitz and Tina Collins were intercepted on October 29, 1985 discussing particular matters. Collins was the office manager of Roofer's Union Local 30/30B. The United States' purpose in adducing the conversation was to infer that petitioner "comes through" for Traitz. The transcript reflects the following exchange:

Traitz:

> Boy the judge gave me all that shit to do and he's a funny judge. If you don't do it, he gets mad.

Collins:

> Judge Braig

Traitz:

> Yeah. Look at all that shit there he gave me. Lipschutz gave me this. But when they come through, they come through, ya know what I mean?

Collins:

> Yeah, right.

Traitz:

> Can't complain.

4. November 4, 1985

Traitz and Mangini were intercepted on November 4, 1985. Traitz advised Mangini that Common Pleas Court judge Joseph Brague "wants to talk to us." Traitz further stated "the judges that I can't get to, he can get to. So I gotta go to him and [petitioner]."

5. November 11, 1985

Traitz, Edward Hurst and others were intercepted on November 11, 1985. Hurst was an official of Local 30 and administrator of union benefit plans. The conversation relates to $168,592 which was paid to the law firm of Bloom, Ocks and Fisher. That firm had a contract to provide legal services to the union. Traitz instructed Hurst that he expected a 10% kickback of the funds provided to the firm of Bloom, Ocks and Fisher. [3]

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[3] On November 21, 1985 Traitz was intercepted discussing the 10% kickback with Herman Bloom and Herbert Fisher. Traitz informed Bloom and Fisher that he "gotta have it before Christmas." Bloom and Fisher are partners in the firm of Bloom, Ocks and Fisher.

In a taped conversation with Herbert Fisher on December 17, 1985, which was played at Fisher's trial and made part of the appendix on his appeal to the Third Circuit, see **United States v. Fisher**, No. 89-1604 (Supplemental Appendix at 459), Traitz conveyed how he had to get the judges in the right "position" or they would not accept the gifts: "You gotta set the right spot, you gotta get the right time. You got... You get

6. November 12, 1985

Traitz, Hurst and Brown were intercepted on November 12, 1985. The conversation was basically a session wherein determinations were made as to what individuals would receive monetary Christmas gifts and in what amounts. Traitz states "There's a couple of judges on here that I'm gonna give a little extra to. You follow me... Like [petitioner]."

7. November 26, 1985

Traitz was intercepted in a conversation with Mangini and others on November 26, 1985. Traitz stated that "[his] guy failed [him] today... That's where you can appreciate a Braig or [petitioner]. That's when you really appreciate them."

8. November 27, 1985

Traitz was intercepted in a conversation with Mangini and others on November 27, 1985. Mangini informed Traitz that "Eric... he's in front of [petitioner]... comin in at eleven o'clock." In response, Traitz requested that Collins attempt to

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some of them judges that start runnin'. When you start handin' you gotta hit 'em in a good position."

contact petitioner. Collins thereafter stated to Traitz "[Petitioner's] office on 70." Because the telephones were not electronically monitored as part of the surveillance, interception of the conversation was limited to Traitz' comments. The transcript of Traitz' utterances states:

Traitz:

> On the Top? Okay. Hello... Hey, Boss, I missed ya. I put it, I put it in, my name on your answerin' thing this morning. I called you at the house, but you were already gone... Ah, a little better. I'll tell you what I did. I was up country for, for three weeks. I bought a, I bought a farm up there... yeah. Well, some weekend with me... Ah, today? No, Judge, no. One day next week I want to have lunch with you. I wanna talk to you. You got a cold?... (Background talk). Well, I'd like, I'd like to, I'd like to know about "em Judge... but I ain't seen ya' in a couple weeks. I missed ya'.
>
> * * *
>
> ...you got a kid goin' in front of you at eleven o'clock. Eric Burns... He's one of, one of, one of my guy's nephews...
>
> * * *
>
> It's an, it's the kid's goin' into the army, judge, and he just needs a clean bill to get into the army. He's gonna, he's gonna go into the

army... okay. Eric is his first name. I don't know how, it starts with a B, looks like a B-R...

* * *

B-U-R-M-S? Or N-S. Burns. It might be Burns. Alright. Judge. How about maybe, maybe Tuesday we get lunch, huh? Well, is that too far ahead for you to... all right. Okay, I'll, I'll, I'll see you Tuesday... I gotta a couple o' things I gotta talk to you about any how. How's Linda"... Good, okay. give her my best... Oh, yeah, well, yo... We.., it should... Hey, she, she's a good girl. Okay, Judge. Ah, check this kid for me. He, he wants to go into the army and, and he needs a clean bill... See ya' Judge... thank you... That's a guy with fuckin' balls.

Authorities "later identified Eric Burns as a young man who was employed as a roofer by a company called Town and Country Roofing." Burns was not a member of the Roofer's union.

9. December 5, 1985

Traitz and others were intercepted on December 5, 1985. Traitz remarked as to the practice of a past business agent of the union (John McCullough) who "used to give his top judges 500." Traitz thereafter announced that he intended to "give...

the guys with balls, I'm gonna [give] five." Traitz included petitioner, Braig and "Bernie Maher" in this category.

10. December 9, 1985

Traitz and Mangini were intercepted on December 9, 1985 at 10:25 a.m. In this conversation Traitz advised Mangini "I'm gonna meet [petitioner] tomorrow." At 4:11 p.m. on that same day, Traitz was intercepted in a conversation with Robert Crosley. Traitz informed Crosley "I gotta meet [petitioner] tomorrow at 12 o'clock down at the... down at their... the non-union restaurant."

11. December 10, 1985

Traitz was intercepted on December 10, 1985 conversing with several others. Traitz stated:

> I was with [petitioner] all day... He's a beautiful guy. Yo, and balls that fuckin' big... You gotta appreciate them judges with balls because there's so many of 'em that got no balls... I can always go to Braig or go to [petitioner] and tell 'em "Hey, I need help."

12. December 27, 1985

Traitz was intercepted on December 27, 1985 participating in a telephonic conversation with petitioner. The

conversation establishes Traitz' awareness of petitioner's impending marriage. The transcript of Traitz's utterances to petitioner states:

Traitz:

> Okay. Hello, hello, hello, hi ya Judge. Did you have a good Christmas? Uh that's, I 'll talk to you later about it. Everything else all right? Sure, Judge, yeah, okay... okay... okay... okay. I think Joe's gonna stay Judge oh I only heard that the other day. You were sitting with me when I heard it. Ah Judge,you're my friend eh Joe Smith eh Ozzie Myers is a better friend you know what I mean. Okay I'll yo I can guarantee I'll give go to him. I sure will. Okay, we need Lucien, we need Lucien, Joe Smith, yeah who else we need Judge? Oh excuse me... okay... thank you Judge. All right let me Eddie All right well I hope to God nobody's taken it. Okay. Let me get rolling, right on it right away. Why who's the third, Lucien, Joe Smith. Ah, and for your thing. What about the first of January? Are you doing anything? Are you and Linda getting married? Well I, ya know, the morning of the 31st, that what day? That's Monday? All right well if a you let me know, I'd like to at least just kiss the bride. Okay, Boss? Good Luck. Good luck my friend. See ya Judge. Bye Bye.

13. January 2, 1986

Traitz was intercepted participating in a telephonic conversation with petitioner on January 2, 1986. The transcript of Traitz' utterances states:

> Traitz:
>
> left to. Did they tell you I called down there? Oh, no. Judge, I called two hours ago. yeah. Oh, oh, because I was going if and I figured, I thought you were busy, you know and I don't like to bother you. Yeah. How, how's Linda...? (Pause) (Talking in background). Yes, he did... Not, not in your life, Judge. Not in you life. Yeah. Oh, I know your, you know, m y commitments is big. But yours is twice as big. Okay. What do you want me to come down cause I'll come down? Okay. O, yeah, I'm coming. Judge, if, if the only thing that could stop me is if something important come up... Judge, Judge, Judge. I, I, I, I'll talk to you about that. I'll talk to you about that. I'll talk to you about that. I, I don't, I don't want to do that. When I'll, when I talk to you. When I see you, I'll talk to you. When I see you, I'll talk to you. No, sir. I don't want to do that. Eh, I spoke to, ah... I spoke to, to Linda's daddy this morning. Mr. Ohstrum (PH) and I told him, I says please be patient because it, it, it's pretty hard to get him what he wants over there. I'm working in the security

> but I'll come up with something. But I didn't want you to think that I forgot about this. Okay, Judge. All right, Judge. Okay... Eh, ah, what's the difference pertaining to, Judge, because I'll run right down there now. If it's, is anybody in any danger? Okay. Okay. Well, I'll see you tomorrow. What room is that, Judge? Okay. 333. Okay, okay, see you tomorrow, Boss. Congratulations. Bye-bye.

b. Visual Surveillance Of A Meeting Between Petitioner And Traitz On December 10, 1985

Jerome Peters is employed by the Federal Bureau of Investigation. Peters is assigned to the Special Operations Unit. That unit provides surveillance coverage. On December 10, 1985 Peters "and three other special agents from the Special Operations Unit "were requested to conduct a surveillance on Traitz.

Traitz was followed to the Riverfront Restaurant, where he arrived at 12:36 p.m. Petitioner and his then finance, Linda Dincel Lipschutz, joined Traitz at approximately 1:00 p.m. Notwithstanding that he was positioned "10 yards away at another table," Peters did not overhear any of the conversation nor did he "observe the passage of anything between Traitz and [petitioner]."

ii.

Commonwealth v. Eric Burns

a. The Initial Appearance Before Petitioner

On November 27, 1985 the litigants in **Commonwealth v. Eric Burns**, Philadelphia Municipal Court No. 85-080536, appeared before petitioner in his capacity as a Municipal Court judge. Immediately prior to petitioner's appearance on the bench, Traitz contacted him by telephone and stated that the defendant Burns was the nephew of a member of the roofer's union. Traitz advised petitioner that Burns was seeking to enter the Army and "needs a clean bill." Defendant Burns was charged with various theft offenses. The Commonwealth sought a continuance because the victim of the theft was ill and unable to testify. Petitioner granted the Commonwealth's request and continued the matter until December 30, 1985.

b. The Subsequent Trial

1. The Guilty Finding

The litigants in **Burns** re-appeared before petitioner for trial on December 30, 1985. Donald Padova represented the defendant, Eric Burns. Marilyn Davidson represented the Commonwealth. The Commonwealth's evidence commenced with the testimony of Officer Dennis Weiss. While on routine patrol, Weiss observed Burns "kneeling on the ground." The officer decided to investigate because "[he] thought possibly that [Burns] had been sick." When Weiss approached Burns he observed "some articles on the ground." He questioned Burns as to his activities in relation to those articles. The response resulted in a decision to frisk Burns and subsequent discovery of particular contraband. Weiss testified:

> Some things were in a box and some were scattered on the ground... There was a carton of cigarettes, I believe some papers... He said he found these articles on the ground and he was looking through them to see if he needed anything. [I searched and] found a screwdriver in his back pocket and I found two containers of pills, which were down the front of his pants.

The "name William Daehling" was imprinted onto the containers of pills found within Burns' pants.

William Daehling also testified at the hearing. Daehling testified that the items found on Burns were stolen from within his (Daehling's) truck. Daehling testified:

> I had it parked right outside my mom's house... I noticed my door was opened, my glove compartment was opened, cigarettes were going out of it. A knife was taken, which I carry for work, and I had my pain pills and everything in there for my back, everything was gone.

Thereafter, the Commonwealth rested.

Burns testified in his own behalf as the only witness presented by the defense. Burns denied any complicity in breaking into the truck. He claimed that he found Daehling's property discarded between a mailbox and bushes. He stated:

> There was like a group of kids down Linden Avenue and like a party down there, and I was going up to a freind's house and there. And I stopped to go to the bathroom, and there was a box under there, and I pulled it out and I was looking through it when the police officers came up. And that is all that really happened... I found [the box] under the mailbox, in between the bushes there... I was looking at the pills and stuff, and the [police came up] and I was holding them, so I just shoved them down here like, so that they wouldn't see it. I should have just dropped them.

Petitioner thereafter found Burns guilty. Petitioner stated:

> The defendant took items which he knew or should have known, or could have known, were not his and took possession of them... He is either guilty of receiving or guilty [of] having taken articles that were lost, misplaced or mislaid... He did not testify he thought they were abandoned, he thought they were just there, whatever that means... I find the defendant guilty of receiving stolen property.

Subsequent thereto, petitioner's consideration turned to sentencing issues. Petitioner **sua sponte** noted "the defendant would have been wiser to go into ARD... but each person is entitled to make up his own mind as to what he wants to do." Burns' attorney thereafter requested that petitioner allow Burns' uncle to allocute "if this Court is thinking about sentencing at this time." Petitioner agreed with the proviso that Padova "make it clear to him it's on the question of sentencing. The case has already been disposed of as far as the verdict is concerned." Robert Edward Nagle was thereafter introduced to petitioner. He allocuted as to his relationship with and knowledge of Burns. Nagle stated:

> The reason why we didn't take the ARD program is, number one, I know the boy real well, I don't believe that he did what he did... Number Two, we are going to enlist him, he is going to enlist in the Armed Forces... the Air Force would not take an ARD... He works for the roofer's union and he works me, I am in the roofer's union.

Petitioner stated "it just seems a shame if he wants to go into the Air Force... let me see counsel in the back." Pursuant to petitioner's direction, an off-the-record conference was conducted.

2. The Setting Aside Of The Verdict

The proceedings reconvened subsequent to the conference. Counsel for defendant Burns made "a motion on the nature of arrested judgment." Counsel averred that the purpose of the motion was to facilitate character testimony. Petitioner responded "I won't grant a motion for arrested judgment, I will grant [however] a motion for a new trial. The new trial will take place now." In an obviously agreed upon sequence of events, the prosecutor "moved to incorporate all testimony from the former trial "and rested on that record.The testimony of defendant Burns was also admitted by reference. Defense counsel at this juncture recited a stipulation between the prosecutor and himself as to character testimony which would be provided by Nagle. Defense counsel thereafter rested. Petitioner reversed the prior finding of guilt. He stated:

> Based upon the character testimony as the deciding factor in a case of this kind, and under

these circumstances, the Court finds the defendant not guilty.

c. The Prosecutor's Account Of The Post-Verdict Conference

As was noted above, Marilyn Davidson represented the Commonwealth in the **Burns** matter. Davidson testified at trial as to the nature of the off the record conference which occurred after the guilty verdict. Davidson described her recollection of the conference. She stated:

> The judge lit into [defense counsel], by the judge I'm referring to the defendant in this case. He yelled at him, claimed that he was an ineffective defense attorney, that he had erred in his preparation of the case -- or in his presentation of the case, that he had character testimony, which he did not use at trial, and that his client had a very good case against him for ineffective assistance of counsel. He went on to say that, as we all know, character testimony is sufficient to raise a reasonable doubt and in this case it would have done so, and the defendant has a very good case against you, meaning Mr. Padova, Donald Padova, who was the defense attorney. And he then went on to say that in the interest of justice he was going to allow the defense to reopen this case and introduce the character testimony as part of its case in chief.
>
> At that point it was -- I made a protest in that I felt that if the -- first of all, the Court had already come up with a verdict, and the verdict was a very sound verdict in that the defendant had basically given his own guilty verdict by his own testimony, he had admitted that he was in possession of the stolen property and he had

admitted basically that he was certainly considering taking it, he was looking through it to see what was there. It was a strong case, the officer's testimony had not been impeached in any way. And I felt that there was no reason to change the verdict on the basis of some erstwhile character testimony that wasn't even character testimony. He said, I'm sure the Commonwealth will not object, because otherwise it will be in the court system for years and years and years, we'll go up to -- the defendant will bring another action, ineffective assistance of counsel, and it will go on up to the motions court, and there's no reason to clog up the system with something so little. And basically he -- that ended the conversation.[4]

iii.

The February 12, 1986 Interview Of Petitioner By Federal Agents

On February 12, 1986 Agent Grace interviewed petitioner at his (petitioner's) residence. Grace testified:

> I had asked Mr. Lipschutz if he had known Steve Traitz, and he indicated that he has known him -- he had known him for some time. I asked him if he knew an individual named Tom Brown -- Thomas Brown, he wasn't quite sure. We had a photograph of Mr. Brown, and once Mr. Lipschutz saw the photograph, he recognized Mr. Brown and said that he was an employee of the Philadelphia Court system, or had been an employee of the Philadelphia Court system. I

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[4] Davidson did not make any notation on the file or elsewhere as to her alleged objection.

had asked Mr. Lipschutz if he recalled meeting with Mr. Traitz at the Riverfront Restaurant on December 10th of 1985, and if he had in fact received an envelope containing $500 cash at that time. Mr. Lipschutz told me that he would have to cudgel his memory as to whether he met with and received an envelope from Mr. Traitz on that date. I asked Mr. Lipschutz if Mr. Traitz had ever requested him to intercede in a case or perform -- or asked for a favor in at that time Judge Lipschutz' official capacity as a judge, and he said that he could not recall if Mr. Traitz had ever asked him to intercede on his behalf. I told Mr. Lipschutz that evidence had been obtained that the meeting occurred on December 10th, 1985, that an envelope had been exchanged. And I had asked him to give some additional thought as to whether he received a cash payment. And at that point the interview terminated and we left.

III.

The Evidence Adduced In Defense

A. <u>The Testimony Of Donald Padova</u>

Padova represented Eric Burns in the proceeding heard by petitioner. Padova testified that Burns was offered placement into the Accelerative Rehabilitative Disposition Program (hereinafter "ARD") but refused. Padova described the program. He stated:

> ARD is a pretrial intervention.... charges are held in abeyance while you are in this program. If you live up to the terms of the program, be it for

> a period of six months, or a year, whatever the terms may be, at the end of that time the Commonwealth will dismiss the charges... You may [also] be eligible to go ask that [the] record be expunged.

Padova also testified as to his recollection of the conference which resulted in a setting aside of the guilty verdict initially pronounced by petitioner. He stated that Davidson in all respects agreed with the disposition proposed by petitioner. Padova stressed that Davidson did not express any reluctance "to enter into the stipulation concerning Mr. Nagle's testimony about Eric Burns' good character." In this context, it is noteworthy that Padova encountered Davidson subsequent to the indictment herein and she commented about the stipulation. Padova testified:

> I passed [Davidson] in the hallway at City Hall.... it was sometime after there was some publicity about this case, [she] said to me and I took it in a joking fashion, she said 'That's the last time I' will do a favor for or give, a break to a defense attorney, that she had gotten called in to explain what had happened in the back.

B. The Testimony Of Petitioner And His Wife

i.

Linda Lipschutz

Linda Dincel Lipschutz married petitioner on February 22, 1986. The marriage ceremony was originally scheduled for December 31, 1985. The December 31 date was selected because it would facilitate joint filing of an income tax return and a comcomitant monetary saving. The date of the wedding was postponed because the physician who performed the necessary blood tests lost the samples.

Linda Lipschutz met petitioner in 1976. During the period prior to their marriage, petitioner introduced her to Traitz. Both Traitz and petitioner advised her that "they were buddies from way back when and for a long time." Lipschutz met Traitz prior to petitioner's first election to a Municipal Court judgeship. She began to encounter Traitz on a regular basis during petitioner's 1985 campaign for election to the Common Pleas Court. Lipschutz stated that "almost at every affair or every meeting that [she and petitioner] went to, like in different wards, he was there."

Lipschutz described the December 10, 1985 luncheon date with Traitz which she attended with petitioner. She stated that Traitz placed two envelopes on the table which he

categorized as wedding gifts. Each envelope contained $250.00. Lipschutz testified:

> Well, we went inside and Mr.Traitz was already there, Steve, as I called him, and he was speaking to someone, so Mitchell and I had stepped aside for a few moments. And when Steve had finished his telephone conversation, he then came to like, there's like an inner door that takes you into the restaurant area. And we went through the door and the maitre d' proceeded to seat us and we were seated -- it was pretty crowded that day and we were seated like at an aisle table and everything by like one of the waiter stands where they get the water and things like that. And we sat down, we talked about just generalities.
>
> * * *
>
> We were talking about the boxing program, the amateur boxing program, and we went from that conversation to my hounding him again because I had asked him to help my father get a job as a security person and everything, my dad was retired and going crazy at home, he didn't have anything to do, and bugging everybody in general, and I thought that perhaps Steve would be able to find something for him. And Steve made the comment that he would do his level best.
>
> * * *
>
> From that, we then started talking about our wedding that was going to take place on New Year's Eve and we wanted to be sure, because I had had previous telephone conversations with Steve, and it was like you had to beat him and like tie him down to say now, look, you're

gonna be there, right? And we want you to be there. And he made a comment about well, yeah, he was going to be the best man. And I said "well, if you showed up, you would be, but you know you have to get there first" and everything. And he was like very, "Oh, God, guys, I'm gonna be there and I'm not gonna let you down," and all this kind of stuff.

And like through all these conversations we're eating and this and that. Then he went into his jacket pocket that he had and he took out two envelopes and he gave Mitchell. He put them down, one in front of Mitchell and one in front of me, and said "Well, I want you guys to have your wedding present ahead of time." He said "With your going away you'll find yourself something nice." And he was also happy I had just quit my job that I had been at for 14 years because I just can't -- couldn't take it any longer, and he said "Well, now you can stay home and be a housewife because that will be a good job for you." And it was like, "No, I'm not going to stay home, I'll find another job."

* * *

Steve and I had an argument about who was going to pay for lunch because I wanted to treat for lunch and God forbid you should treat to lunch if you're a woman, so he took out his credit card and he paid for the lunch. And he got the receipt back with the credit card and he said "Linda, I need for you to give me your dad's telephone number one more time so I can give him a call." So I gave him my dad's telephone number and he had written it down on the back of the receipt and he said "now, you're sure you want him to have a security job?" And I said "Yup." And he wrote security beneath it. And we started to get up and I greedily grabbed both envelopes and put them in my pocketbook and

> we got our kisses and holiday wishes and was told to please be sure to make it to the union Christmas party when we got back from our vacation and then we left, we each went our separate ways.

ii.

Petitioner's Testimony

a. Petitioner's Background And Introduction To Traitz

Petitioner testified in his own behalf at trial. He was 67 years old at the time of trial. Petitioner was born and has essentially spent his entire lifetime in and around Philadelphia. He attended Philadelphia public schools and thereafter received both his undergraduate and law degrees from the University of Pennsylvania. Petitioner was elected to Phi Beta Kappa in undergraduate school and to Order of the Coif in law school. Upon graduation from law school, petitioner "worked initially for some law firms." He thereafter accepted employment with the City Solicitor's office. Petitioner subsequently became solicitor to the Board of Magistrates where he structured the Philadelphia Traffic Court.

After entering private practice, petitioner represented various union members. In this capacity, he met Traitz. Petitioner stated:

> I represented union members, particularly union members who were dissidents who at that time were trying to oust certain union leaders of certain locals who were -- the best word I can think of, corrupt. And the union rank and file, many of them, wanted them ousted and I represented them for that purpose.
>
> * * * *
>
> I represented Spephen Traitz and some of his friends. I also represented them in regard to activities on the picket line. I would go with them when there was some difficult picketing, to try to see to it that they picketed within the limits of what laws there were or what court orders there were to make sure they were not violated and that they would do things lawfully, so they did not get into trouble.

b. Political Campaigns - The Necessary Associations And Fundraising

Petitioner was elected to a Municipal Court judgeship in 1979. During the campaign, petitioner received financial contributions from the Roofer's Union and various other unions. Petitioner described the activities associated with an election campaign for a judgeship. He stated:

> Well, I suppose it's basically the same as is entailed in an election campaign for anything. You have to attend functions, dinners, luncheons, meetings, particularly ward meetings where you appear in front of the ward leader or chairman, the members of the ward committee, those are the committeemen basically, and in front of women's groups, men's clubs, all kinds

> of functions. It's a not only a daily attendance, it's usually three, four, five places to be on a particular -- at a particular time.

Fundraising is also a substantial aspect of campaigning. In this context, petitioner sought the financial support of the Roofer's Union and other unions in his 1985 campaign for a Common Pleas Court judgeship. Petitioner enlisted the aid of a labor coordinator, John Morris, to assist in solicitation of assistance from labor organizations. Morris was associated with the Teamster's Union. Subsequent to Morris' acceptance of the position, other responsibilities precluded him from effectively discharging this function. Petitioner thereafter requested that Traitz assume Morris' functions in the campaign. Traitz agreed to this proposal. Because of Traitz' position as his labor coordinator, petitioner either spoke to or saw him every day during the campaign.

c. The December 10, 1985 Meeting

Traitz also became relatively closely acquainted with Linda Lipschutz prior to her marriage to petitioner. In fact, Traitz urged petitioner to "marry her before somebody grabs her away." The freindship relationship which encompassed all the parties prompted the December 10, 1985 luncheon with Traitz to

which petitioner brought his then wife-to-be. Traitz at the luncheon "put down... two envelopes and stated" good luck to you guys... here's something to get something." When they exited the restaurant, petitioner and Linda Lipschutz visited Dr. Silk's office for blood tests. The following day, they departed on a 10 day cruise.

d. Commonwealth v.Eric Burns

On November 27, 1985 Traitz contacted petitioner regarding Eric Burns. It was not uncommon for petitioner to receive telephone calls from concerned individuals which related to particular cases. Such calls ordinarily emanate from ministers, priests and rabbis. Petitioner's practice was to treat such callers with respect. However, he at no time permitted a telephonic contact to influence his judicial judgment. Petitioner explained the disposition in Burns at trial. He stated:

> On December the 30th. Well, when the case started in front of me, I recognized Mr. Padova. I did not recognize Mr. Burns, but I recognized Mr. Padova and I realized that this was the case that Mr. Traitz, concerning which Mr. Traitz had spoken to me. Of this good kid who had a clean record. And I heard the case. And I was convinced... [that] his disposition when he found the things, was that he was going to keep it even though it was clear that it belonged to somebody.

And I heard the evidence and I just did not hear enough evidence to convince me that he was the one who had broken into, although I think it was unlocked, so -- but that he had legally, legalistically broken into the truck and taken. So, that I never found him guilty, in fact, found him not guilty of actually taking the evidence from the truck. That was one thing...

I believed that he did have the intent not to return the bags, the items. And therefore, I found him guilty of receiving stolen property and not guilty of the actual taking.

* * *

Well, the next thing that was done was, would have been the question of sentencing. And in preparation for that, the Clerk of Quarter Sessions, assigned to the room at that point, hands you up a sheet. Hands you up a sheet that shows what the defendant's records was. And I looked at the sheet and the defendant had no record. And he in fact, had a clean record. And I asked why didn't this go into ARD and I was told that he had rejected it. Which made it seem to me even more likely, because most person's if they do do something like that, however minor and they get caught at it, welcome ARD, because they then just have to be good for a short period like 6 months and their record is wiped out and it, for all practical purposes, as good as a not guilty except for the fact that you cannot again, get into the ARD program.

* * *

Well, frankly, at that point, I was trying to think of what to do to make things right. Because, here's a young man, who if I had heard that he had no record, that he did, in fact, have a clean

record, I would not have found him guilty because character testimony, by itself under the law, can raise a reasonable doubt.

* * *

When we went into the chambers conference, I pointed out to Mr. Padova how his error had caused me to do something that I felt wasn't just. That had caused me to find the young man guilty and prevent his going into the service, which at that time, is what had been indicated to me. And that I was really surprised because I thought that he knew better than that, not to introduce such an important piece of testimony. And I said then, to him and of course, Ms. Davidson was present. And I said, the only thing that you really can do now, is to take an appeal. However if this boy really wants to go into the service, it's a shame and if you would agree, both the District Attorney would agree, because of the nature of this case, it being a small case, the District Attorney wanted to put into ARD, not the defense or anyone else. I said because of the nature of the case and the circumstances, rather than go through that appeal process, I would be willing to allow you to have a new trial or re-open the case and put in the character testimony. I then turned to Ms. Davidson, whom I had never seen in my courtroom before, so that I assumed she was a new Assistant District Attorney. And I didn't want to help one person by hurting another person. So, I asked her, do you want to contact you office, your superiors to find out if they would have any objection, after that she said that she had no objection. She said it's perfectly all right with me, Counsel did make a mistake, that's clear and it's perfectly all right with me.

And I asked her, do you want to call your office to make sure? Because, as I said, I didn't want to see her get into trouble. And she said, no.

> And we discussed it further and before we left the room, I said to her a second time, are you sure you don't want to call your superior? and she said no, I'm in charge of the room here. This my room, they put me in a charge, I'm in charge and I make the decision and we can go. And we went back into the courtroom. I allowed the case to be re-opened, the character testimony to go in by stipulation and made the decision of not guilty, which I would have done in the first place, [had] there been the character testimony.

Petitioner denied that his disposition of the Burns matter was to any degree influenced by the wedding gift.

e. The February 13, 1986 FBI Interview

On February 13, 1986 petitioner had been home all day suffering from a virus. When the FBI agents entered his residence, he was downstairs drinking tea. The agents made various inquiries of petitioner. They specifically asked petitioner whether he received an envelope at the December 10 luncheon with Traitz. Petitioner responded that [he] wasn't sure of the date and [he] really wasn't feeling well enough to concentrate but... would try to cudgel [his] mind whether on that date he had received an envelope." The agents also asked whether Traitz requested that petitioner intercede in a court proceeding involving a roofer. Petitioner responded to the agents that "nobody had asked [him] to intercede for anybody."

f. The Disclosure Report Concerning The Wedding Gift

On April 29, 1986 petitioner filed the required disclosure form relative to receipt of personal gifts by a judicial officer. The form listed the $500.00 wedding gift received from Traitz.[5]

C. Character Witnesses

Petitioner presented a plentitude of substantial character witnesses. These witnesses included, inter alia: Jerome Shestack Esq., who is in the House of Delegates of the American Bar Association and was previously First Deputy City Solicitor Donald Marino Esq., who was previously Chief of the Major Trial Division in the Philadelphia District Attorney's Office and Chancellor of the Philadelphia Bar Association Richard M. Rosenbleeth Esq., a senior partner in the law firm of Blank, Rome, Comisky and McCauley Willie D. Harris, Esq., who is a member of the Board of Governors of the Philadelphia Bar Association William Rafsky, who is Deputy Managing Director of the City of Philadelphia Clem R. Moragne, who is

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[5] Petitioner also testified as to and identified a watch which he gave to Traitz "shortly before the election of 1985." The watch was an expression of freindship and appreciation for Traitz' work on petitioner campaign. Traitz' wife brought the watch to court and testified at trial.

deputy administrator in the Orphan's Court of Common Pleas: Lucien Blackwell, who is presently a United States Congressman and was formerly a city councilman and president of a Longshoreman's local and Jannie L. Blackwell, who was a candidate for the Philadelphia city council at the time of trial.

On the basis of the jury's consideration of the foregoing evidence, petitioner was convicted of the Hobbs Act violation charged in the indictment. As was noted above, over petitioner's objection, the jury was not instructed that the United States was required to prove a quid pro quo.

Reasons For Granting The Writ

POINT I

Certiorari Must Be Granted To Resolve The Issue Left Unanswered In McCormick As To Whether The United States Must Prove A Quid Pro Quo As An Element Of An Under Color Of Official Right Hobbs Act Prosecution Where The Payment At Issue Is Not Alleged To Have Been A Campaign Contribution

Petitioner argued to the district court that an indictment which charges an alleged "color of official right" violation of the Hobbs Act requires that the United States prove quid pro quo.

Petitioner relied substantially upon **McCormick v. United States v. ___ U.S_, 111 S.Ct 1867 (1991)**, as support for his interpretation of the elements of an "under the color of official right" violation. The United States disagreed with petitioner's position as to the law and persuaded the district court that the statute requires only that "the defendant know that he's receiving the money in light of his official position." The United States submitted that **McCormick** and its **quid pro quo** requirement is limited to acceptance of campaign contributions. In adopting the position of the United States, the district court stated:

> I am going to instruct the jury in this case when the time comes that it's enough that Steven Traitz have transferred something of significant value to the defendant with the expectation that the defendant, a public official, will extend to him some benefit or refrain from some harmful action, and the public official accepts the thing of signficant value knowing that it is being transferred to him because of his office. That's the law that I will give to the jury, that's what I think the law is.

Consistent with its rejection of petitioner's view as to **quid pro quo**, the district court instructed the jury that passive receipt and retention of property violates the Hobbs Act. The district court instructed the jury as follows:

Extortion under color of official right is the wrongful taking or accepting by a public official of money or other property not due him or his office. It is enough that the benefactor transfers something of significant value to the public official with the expectation that the public official will extend to him some benefit or refrain from some harmful action. And the public official accepts the thing of significant value knowing that it is being transferred to him because of his office.

All that is necessary is that the motivation for the payment or giving of property, be the public official's office to which the defendant was not entitled. In short, the benefits must have been given to the defendant because of his public office and the defendant must have accepted the benefit knowing the motive.

There's no requirement that the public official induced the payment, or giving of other property in the sense that he demanded it, initiated it, suggested it or solicited it. The public office itself provides the inducement for the giving of the property.

The Government need not prove as part its case that the public official misused his office in a sense that he granted some benefit or advantage to his benefactor to which the benefactor was not entitled.

A public official misuses his office when he passively receives and retains property because of his office. In short, the Government need not show that the defendant did anything for the person or entity which gave him property or even promised to do so. A public official's retention of things of value paid to him by private persons for performance of official duty is a misuse of his

> office in and of itself. This is true, even if the public official accepts property for an implicit promise of fair treatment.
>
> It is not necessary to prove that the defendant obtained or accepted money or property through the use of coercion, duress or fear toward the payor. (emphasis added)

The Third Circuit Court of Appeals, in a judgment order, affirmed the district court.

We submit that the Third Circuit erred and in so doing affirmed deprivation of petitioner's right to a fair trial. The United States was relieved of its burden to prove beyond a reasonable doubt a critical element of the offense, viz. quid pro quo. In the event that this Court agrees with our position as to the applicability of **McCormick** to non-campaign contributions, it must reverse petitioner's conviction. In this context, we note as did the **McCormick** Court that a clear conflict exists in the various Circuit Courts of Appeals with respect to the quid pro quo issue as it relates to non-campaign contributions. The authority which supports quid pro quo as an element has the most juridical cogency. See, **United States v. Nelson 672 F.Supp. 812, 817-818 (D.N.J. 1987), aff'd in part and rev'd in part 852 F.2d 706 (3 Cir. 1988)** (Under color of right prong of the Hobbs Act the United

States must prove that the public official used the power of his office to induce payments not due him or his office).

We urge this Court to clarify any confusion and specifically pronounce **quid pro quo** as an element of an "under color of official right" Hobbs Act violation. Once this Court has so stated, the posture of this matter will be that petitioner was convicted on a jury finding of less than all of the required elements of the offense charged in the indictment. Such an obvious affront to due process will require the setting aside of the verdicts. Fundamental fairness demands no less.

i.

McCormick v. United States

In **McCormick v. United States, supra at 1813,** the United States Supreme Court granted certiorari "because of disagreement in the Courts of Appeals regarding the meaning of the phrase under color of official right as it is used in the Hobbs Act ." The petitioner's challenge in **McCormick** to the judgement below was limited to the rejection of his claim that payments made to him by or on behalf of doctors were campaign contributions, the receipt of which did not violate the Hobbs

Act. 111 S.Ct. supra at 1814. The Court in McCormick commenced its analysis with the finding "[that] it is proper to inquire whether payments made to an elected official are, in fact, campaign contributions and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry." 111 S.Ct. supra at 1815. The McCormick Court, however, disputed the "approach [of] distinguishing between legal and illegal campaign contributions." Id.

The McCormick Court ruled that mere acceptance of a campaign contribution in any context is not a Hobbs Acts violation. The Court in McCormick stated:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official

> right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit that the Hobbs Act contains to justify a contrary conclusion. [111 S.Ct. supra at 1816].

Notwithstanding the above-quoted finding, the McCormick Court stated "it is [not] impossible for an elected official to commit extortion in the course of financing an election campaign." 111 S.Ct. supra at 1817. The Court set forth the analytic framework for such a violation. The Court ruled that acceptance of a campaign contribution can constitute a violation of the Hobbs Act where it entails a quid pro quo. 111 S.Ct. supra at 1817. The McCormick Court stated:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

> This formulation defines the forbidden zone of conduct with sufficient clarity. [111 S.Ct. supra at 1817].

The McCormick Court relied upon language set forth within State v. Dozier, 672 F.2d 531, 537 (5 Cir. 1982). McCormick v. United States, supra at 1816. With respect to the issue as to whether every violation of the Hobbs Act by an elected official requires proof of a quid pro quo, the McCormick Court declined to rule. The Court stated that "McCormick's sole contention in this case is that payments made to him were campaign contributions." 111 S.Ct. supra at 1817 fn.10.

ii.

Evans v. United States

In Evans v. United States v. ___ U.S_, 119 L.Ed.2d. 57 (1992), this Court granted certiorari to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act. This Court in Evans ruled that it is not. Because inducement and quid pro

quo are distinct but related concepts, the ruling in **Evans** has clear juridical significance in the analytic equation as to whether the **McCormick** requirement of **quid pro quo** applies to non-campaign contributions. In this context, we observe that **Evans** involved an alleged campaign contribution. However, the majority's holding in **Evans** was not limited to campaign contributions in any phraseology within the opinion. And, as was noted above, a concurring justice and three dissenting justices specifically stated that the majority in its holding extended the **McCormick** requirement of **quid pro quo** to non-campaign contributions.

The district court in **Evans** instructed the jury that passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The Eleventh Circuit Court of Appeals affirmed that instruction as correct. The majority of this Court in **Evans** concluded "that the [instruction] satisfies the **quid pro quo** requirement of **McCormick.**" **119 L.Ed.2d supra at 72.** The majority of this Court stated:

> The offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the **quid pro quo** is not an element of the offense. [Id.] (emphasis added)

The **Evans** Court majority specifically synthesized its holding. The holding essentially defined "under color of official right" and did not restrict its application to campaign contributions. The "in return for" language clearly established **quid pro quo** as an element. The **Evans** Court stated:

> We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was in return for official acts. [Id.] (emphasis added).

It cannot be gainsaid that a majority of this Court in **Evans** clearly articulated that the payment must be given in return for official acts. The majority of this Court stated that such a requirement is derived from the statutory language "under color of official right", which has a well-recognized common-law heritage that distinquished between payment for private services and payments for public services. **119 L.Ed.2d supra at 72 fn20.** It bears repeating that the majority of the **Evans** Court did not state that its holding was limited to campaign contributions. And, we iterate that at least four

justices of this Court specifically interpreted the majority holding in **Evans** as extending the **McCormick** requirement of **quid pro quo** to non-campaign contribution contexts.

Justice Kennedy, in a concurring opinion, stated that "in [his] view the dissent is correct to conclude that the [majority's holding] requires a **quid pro quo** as an element of the Government's case in a [Hobbs Act] prosecution". **Evans v. United States, supra at 75.** Justice Kennedy further stated:

> Although the Court appears to accept the requirement of a **quid pro quo** as an alternative rationale, in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question.... Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all § 1951 prosecutions. That is as it should be, for, given a corrupt motive, the **quid pro quo**, as I have said, is the essence of the offense. [119 L.Ed.2d supra at 75-78].

The Chief Justice and Justices Scalia and Thomas dissented. Justice Thomas wrote the dissenting opinion. The dissent completely disagreed with the majority's holding as to the configuration of the offense. The dissent espoused the view that the petitioner was not guilty of a § 1951 "by color of his

office" violation because "the money or thing received must have been claimed, or accepted, in right of office, and the person paying must have yielded to official authority." **Evans v. United States, supra at 81.** The dissent stated "because the Court misapprehends the color of office requirement, the crime it describes today is not the common-law crime that Congress presumably incorporated into the Hobbs Act." **Id at 82.**

The dissent also specifically stated that it interpreted the majority's holding as extending the **quid pro quo** requirement set forth in **McCormick** to non-campaign contribution contexts. Justice Thomas stated:

> "[T]he **quid pro quo** limitation imposed [in McCormick] represented a reasonable first step in the right direction... that limitation was overly modest... Today's extension of McCormick's reasonable (but textually and historically artificial) **quid pro quo** limitation to all cases of official extortion is both unexplained and inexplicable - except insofar as it may serve to rescue the Court's definition of extortion from substantial overbreadth. **[119 L.Ed.2d supra at 84].**

iii.

In Omitting The Element Of Quid Pro Quo The District Court Clearly Misinstructed The Jury

The McCormick Court recognized that a conflict exists in the Circuits respecting the applicability of the quid pro quo requirement to non-campaign funds. That conflict was precedentially unaffected by the McCormick decision. The Court in McCormick stated that "the conflict on this issue is clear, but this case is not the occasion to resolve it." 111 S.Ct. supra at 1813 fn.5.[6] In discussing the existence of a conflict, the McCormick Court made reference to decisions in the Second, Fourth, Ninth and Eleventh Circuit Courts of Appeals. An analysis of the law in those circuits is instructive.

The Second Circuit in United States v. O'Grady, 747 F.2d 682 (2 Cir. 1984), stated that mere acceptance of benefits by a public official is not extortion under color of official right. The O'Grady Court found that the Hobbs Act requires that "the public official make wrongful use of his office to obtain money not due him or his office." Id. at 687. Simply stated, the O'Grady Court held that "the conduct proscribed by the Hobbs Act is the wrongful use of public office, not merely the acceptance of benefit." 742 F.2d supra

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6 This case is clearly the appropriate occasion to resolve it.

at 687. The O'Grady Court relied upon United States v. Dozier, supra. United States v. O'Grady, supra at 689. As was noted above, the Dozier decision was also cited in McCormick as support for the decision therein. See, McCormick v. United States, supra 1816.

Another significant aspect of O'Grady is that the Court therein specifically analyzed Third Circuit precedent and concluded that the law of that Circuit "does not permit a conviction for extortion under color of official right absent evidence that the public official misused his office to obtain benefits." 742 F.2d supra at 689. See, United States v. Jannotti, 742 F.2d 578, 595 (3 Cir. 1982) (payment made after assurances that there would be no obstacles to construction hotel project). Based on the ruling herein, it would appear that at least one panel of the Third Circuit disagrees with the O'Grady Court.[7]

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[7] Comments by the judges at oral argument indicated that they may have been of the mistaken view that Evans affirmed United States v. Kenny, 462 F.2d 1205, 1229 (3 Cir. 1972), from which the instruction in the instant case was essentially extracted. Justice Thomas, dissenting in Evans, criticized Kenny because it "obliterated the distinction between extortion and bribery essentially creating a new crime encompassing both." Evans v. United States, supra at 86-87.

In **United States v. Aguon**, 851 F.2d 1158, 1166 (9 Cir. 1988), the Ninth Circuit Court of Appeals stated "we find ourselves in agreement with the Second Circuit's conclusion that inducement is an element required for conviction under the Hobbs Act." The **Aguon** Court stated:

> We note with approval that the Second Circuit has analyzed the facts of cases in which other courts of appeals have explicitly rejected the necessity of proof of inducement and concluded that "the facts of those cases, and of most reported decisions construing extortion under color of official right, establish conduct from which inducement can readily be inferred." **O'Grady, 742 F.2d at 689.** Writing for the Seventh Circuit, Judge Posner noted: "There is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been pressed was the official passive." [Id.].

In **United States v. Evans**, 910 F.2d 790, 796-797 (11 Cir. 1990), **aff'd Evans v. United States, supra**, the Eleventh Circuit deviated from the ruling in **O'Grady**. **Evans** was ultimately presented to this Court for disposition of the inducement issue. However, the **Evans** formulation adopted prior to this Court's ruling as to the public official's Hobbs Act liability extends beyond that utilized by the district court below. The Eleventh Circuit stated in **Evans**

"under the law of this circuit... the official [must] know that he is being offered the payment in exchange for a specific requested exercise of discretion." 910 F.2d supra at 796. Simply put, the Eleventh Circuit requires an acceptance of money in exchange for a promise. Or, more specificially, that Circuit is essence utilized a quid pro quo standard.[8] That standard was thereafter adopted by a majority of this Court.

The Fourth Circuit in United States v. Spitler, 800 F.2d 1267, 1274-1275 (4 Cir. 1986), ruled consistent with the conception of the district court herein. The Spitler Court stated that "the public official [must] accept the thing of significant value knowing that it is being transferred to him because of his office." Id. at 1274-1275. Significantly, the Spitler Court found that the defendant "not only retained the benefits that TEI had provided to him, but also coercively demanded the items." Id. Thus, the official in Spitler was not passive. See, United States v. Aguon, supra at 1166.

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[8] A reading of the circuit court opinion in Evans underscores the necessity of understanding the distinction between the quid pro quo and inducement issues.

We are of the view that **United States v. Nelson, supra**, sets forth the most cogent position within published authority in this Circuit. The decision in **Nelson** rests somewhere between the majority and dissenting opinions in **Evans**. Although it is district court authority, we pressed the Third Circuit to adopt it. The **Nelson** Court ruled that a public official charged with a Hobbs Act violation must be demonstrated to have used his power to induce payments not due his office. The Court in **Nelson** found that an uncertainty existed in this Circuit post-**Janotti** because of "ellipses used [therein] in quoting from "**United States v. Kenny, 462 F.2d 1205, 1229 (3 Cir. 1972). United States v. Nelson 672 F.Supp supra at 815.** The **Nelson** Court stated:

> Without pausing to analyze why the language of the Hobbs Act and the common law dictate that inducement or demand should be the anchor of color of official right, it is clear that without the anchor, official right goes out to sea, bizarre results obtain, and uncertainty again rears its head... It would defy logic to penalize the mere receipt of a gratuity, effectively, a lesser included offense of bribery, the same as the greater offense... Certainly, too, more than a gift or a mere taking is required if state and local officials are not to face penalties potentially ten times greater than federal officials, under federal law,

> for identical conduct. See, 18 U.S.C.A. § 201(g)... whether it is called inducement, exploitation, use of office, demand, coercion... there must be a causation component for there to be extortion, i.e. something done by an official which causes one to knowingly part with money or property. [672 F.Supp supra at 815-818].

In sum, we respectfully submit that this Court must grant certiorari to clarify the uncertainty as to application of the **McCormick** "color of right/quid pro quo" requirement to non-campaign contributions. This case squarely raises the issue and only this Court can resolve it.

iv.

The Hobbs Act Was Intended To Proscribe Extortion As Opposed To Bribery

The most cogent analysis of 18 U.S.C.A. § 1951(a) is set forth in the concurring opinion in **McCormick v. United States, supra at 1818,** authored by Justice Scalia. We so advised the Third Circuit in a reply brief. The analysis therein leads forcefully to the conclusion that the statute does not to any degree prescribe bribery but was intended only to emcompass extortion. Simply stated, the key to understanding the statute is a comprehension of the distinction between bribery

and extortion. Justice Scalia's concurring opinion traces the relevant provisions from the Anti-Racketeering Act of 1934 to their unchanged inclusion in the Hobbs Act of 1948. A detailed discussion of Justice Scalia's concurring opinion is instructive. At the outset, we further observe that in **Evans v. United States, supra**, the Chief Justice and Justices Scalia's and Thomas dissented on the ground that § 1951(a) is limited to extortion.

Federal prosecutors "in the 1960's" first sought to apply the Hobbs Act "to reach what was essentially the soliciting of bribes by state officials." **McCormick supra at 1819.** However, courts generally rebuffed these initial efforts. The courts ruled "that public officials were not guilty of extortion when they accepted, or even when they requested, voluntary payments designed to influence or procure their official action." **Id.** The courts held that the Hobbs Act required fear and a lack of voluntariness in order to constitute extortion as opposed to mere bribery. Simply put, courts interpreted the Hobbs Act as prescribing extortion and excluding bribery from its purview. See, **United States v. Hyde, 448 F.2d 815, 833 (5 Cir. 1971); United v. Addonizio, 451 F.2d 49, 72 (3**

Cir. 1971); **United States v. Kubacki**, 237 F.Supp. 638, 641 (E.D.Co. 1965).

Thereafter, in 1972 Third Circuit incited a departure from the Hobbs Act extortion/duress concept in **United States v. Kenney, supra at 1229.** The **Kenney** Court ruled that kickbacks to public officials established extortion under color of official right despite the lack of proof as to threat, fear or duress. The Seventh Circuit adopted the **Kenney** Court's interpretation of the statute in 1974. See, **United States v. Braesch**, 505 F.2d 139, 1511 (1974). Several other circuits followed in later years. See, **United States v. Hathaway**, 534 F.2d 386, 393 (1 Cir. 1976); **United States v. Hall**, 536 F.2d 313, 320-321 (10 Cir. 1976).

Justice Scalia succinctly described the issue of statutory construction which has erroneously resulted in inclusion of bribery cases within the statute's reach. We stress that the distinction between bribery and extortion is that bribery does not require duress or inducement. The extortion proscribed within the Hobbs Act was clearly intended to entail inducement and/or **quid pro quo.** In **McCormick, supra at 1819-1820,** Justice Scalia stated:

It is acceptance of the assumption that "under color of official right" means "on account of one's office" that brings bribery cases within the statute's reach, and that creates the necessity for the reasonable but textually inexplicable distinction the Court makes today. That assumption in questionable. "The obtaining of property ... under color of official right" more naturally connotes some false assertion of official entitlement to the property. This interpretation might have the effect of making the § 1951 definition of "extortion" comport with the definition of extortion at common law. One treatise writer, describing "extortion by a public office" states: "At common law it was essential that the money or property be obtained under color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." 3 R. Anderson, Wharton's Criminal Law and Procedure 790-792 (1957).

It also appears to be the case that under New York law, which has long contained identical "under color of official right" language and upon which the Hobbs Act is said to have been based, see Ruff, supra at 1183, bribery and extortion were separate offenses. An official charged with extortion could defend on the ground that the payment was voluntary and thus he was guilty only of bribery. People v. Feld, 262 A.D. 909, 28 N.Y.S.2d 796, 797 (Supp. Ct. 1941); See, People v. Dioguardi, 8 N.Y.2d 260, 273-274, 203 N.Y.S.2d 870, 168 N.E.2d 683 (1960). I am aware of only one pre-Hobbs Act New York prosecution involving extortion "under color of official right," and there the defendant, a justice of the peace, had extracted payment from

> a litigant on the false ground that it was due him as a court fee. **People v. Whaley, 6 Cow. (N.Y.) 661, 661-663 (Sup.Ct.1827).**
>
> Finally, where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion-and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it. See, 18 U.S.C. § 201(b) (criminalizing bribery of and by federal officials). Compare 18 U.S.C. § 872 (criminalizing extortion by federal officials, making no provision for punishment of person extorted). **McCormick**, though not a federal official, is subject to federal prosecution for bribery under the Travel Act, 18 U.S.C. § 1952, which criminalizes the use of interstate commerce for purposes of bribery-and reaches, of course, both the person giving and the person receiving the bribe.

The impressive analysis which underpins Justice Scalia's concurring opinion in **McCormick** was essentially precursed in **United States v. Nelson, supra.**The **Nelson** Court stressed "the bizarre results which can obtain if inducement is read to refer to everything in the statute but color of official right." **672 F.Supp supra at 816.** "Logically and rationally it cannot be gainsaid that when a public official merely accepts unsolicited benefits knowing that they were given because of his public office, it is not extortion." **United States v. Nelson, supra at 817 citing United States v. O'Grady, 742**

F.2d 682 (2 Cir. 1984). In this context, the Nelson Court observed "it would defy logic to penalize the mere receipt of a gratuity, effectively a lesser included offense of bribery, the same as the greater offense. 672 F.Supp supra at 817.

As was noted above, the Chief and Justices Scalia and Thomas dissented in Evans v. United States, supra, on the basis of their adoption of Justice Scalia's reasoning in his concurring opinion in McCormick. Writing for the dissent, Justice Thomas stated:

> Although the Court purports to define official extortion under the Hobbs Act by reference to the common law, its definition bears scant resemblance to the common-law crime Congress presumably codified in 1946... the common law makes plain that the offense was understood to involve not merely a wrongful taking by a public official, but a wrongful taking under a false pretense of official right... bribery and extortion are different crimes. An official who solicits or takes a bribe does not do so... under any pretense of official entitlement... Where extortion is at issue, the public official is the sole wrongdoer; because he acts under color of office, the law regards the payor as an innocent victim and not an accomplice... [the majority's] interpretation has no basis in the statute that Congress passed in 1946. If the Court makes up this version of the crime today, who is to say what version it will make up tomorrow when confronted with the next perceived rascal? [119 L.Ed 2d supra at 79-90]

We submit that no cogent authority contradicts the ratiocination of Justice Thomas' dissent. The Evans majority took a step toward this position when it extended the requirement of quid pro quo to non-campaign contributions.

POINT II

Certiorari Should Be Granted To Clarify The Interstate Commence Element Of The Hobbs Act As It Relates To The Source Of Funds Used In An Extortion

The affect on interstate commerce jurisdictional element of the Hobbs Act violation at issue herein was proved on the assumption that the Welfare Fund from which the prepaid legal services plan was paid constituted an asset of the union.[9] Employee trust funds which are the product of collective bargaining agreements are not considered assets of the union. See, Waggoner v. Dallaire, 649 F.2d 1362, 1368 (9 Cir. 1981) (As a matter of federal law, the union and its representatives are not agents of a trust fund created by collective

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9 The district court instructed the jury as follows:

If you find beyond a reasonable doubt that the roofers union had jurisdiction over Pennsylvania, New Jersey and Delaware, and its assets were depleted by a $500 payment to the defendant and then the interstate commerce element has been satisfied..

bargaining agreement; trust authorities are distinct and independent entities separate from the union that negotiates the collective bargaining agreement establishing the trust). **Cf. Turner v. Local Union No. 302, 604 F.2d 1219, 1227 (9 Cir 1979)** (The purpose of separation into a trust fund is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers).

In the event that the Welfare Fund is not an asset of the union, the United States has failed to prove the necessary jurisdictional element of the offense. An error in recognition of this factor would constitute plain error which resulted in a manifest miscarriage of justice. **Lewis v. Benedict Coal Co. 361 U.S. 459 (1960). See, United States v. Sorondo, 845 F2d 945, 958 (11 Cir 1988).** Jurisdiction is the cornerstone element of any federal offense.

Conclusion

For the foregoing reasons, we respectfully request that this Court grant certiorari.

Respectfully Submitted

ALAN DEXTER BOWMAN
Counsel For Petitioner

Alan Dexter Bowman
Raymond A. Brown
Raymond M. Brown

Of Counsel And On The Petition

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 13, 1992

No. 91-1946

UNITED STATES OF AMERICA

v.

MITCHELL S. LIPSCHUTZ,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 90-00482-01)
District Judge: Robert F. Kelly

Argued July 8, 1992

Before: SLOVITER, *Chief Judge,* STAPLETON, and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

1. Whether the district court violated appellant's rights to confrontation and a fair trial by admitting audio recordings of hearsay conversations between Steven Traitz and others which contained references to alleged past "other crimes" committed by appellant and detailed a comprehensive and apparently successful effort by the Roofer's Union to corrupt a major portion

of the Philadelphia judiciary?;

2. Whether the district court erred in ruling that the Hobbs Act does not require proof of a *quid pro quo* in the context of alleged under color of official right offenses?;

3. Whether appellant was denied a fair trial by improper cross-examination of his character witnesses on the part of the United States?;

4. Whether this prosecution in federal court is violative of appellant's speedy trial and double jeopardy rights?;

5. Whether this matter must be remanded for a hearing as to whether the money paid to appellant by Traitz was derived from a fund properly classified as an asset of the Roofer's Union?; and

6. Whether the United States adduced sufficient evidence of appellant's knowledge that the money was provided to him because of his office?,

It is ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Dolores K. Sloviter
Chief Judge

Certified as a true copy and issued
in lieu of a formal mandate on
August 4, 1992

Appendix A

Test: Sally Mvros

Clerk, United States Court of
Appeals for the Third Circuit.

Attest:

s/ Sally Mrvos
SALLY MRVOS

Dated: JUL 13 1992